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NATIONAL ASSOCIATION OF THE DEAF

814 THAYER AVENUE • SILVER SPRING, MARYLAND • 20910-4500
HEADQUARTERS: 301-587-1788 VOICE • 301-587-1789 TTY • 301-587-1791 FAX
BOOKSTORE: 301-587-6282 VOICE • 301-587-6283 TTY • 301-587-4873 FAX

February 28, 1997

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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FEB 28 1997

Federal Communications Commission
Office of Secretary

Re: In the Matter of Closed Captioning and Video Description
of Video Programming, Implementation of Section 305 of the
Telecommunications Act of 1996, Video Programming
Accessibility, MM Dkt. No. 95-176

Dear Mr. Caton:

Enclosed please find an original and six copies of the Reply of the National Association of the Deaf in the in the above captioned proceeding.

I would appreciate your referring all correspondence regarding this matter to my attention.

Sincerely,

Karen Peltz Strauss
Legal Counsel for Telecommunications Policy

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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Federal Communications Commission
Office of Secretary

In the Matter of)
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Description of Video Programming) MM Docket No. 95 -176
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Implementation of Section 305 of the)
Telecommunications Act of 1996)
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Video Programming Accessibility)

COMMENTS OF
THE NATIONAL ASSOCIATION OF THE DEAF

Karen Peltz Strauss
Legal Counsel for Telecommunications Policy
National Association of the Deaf
814 Thayer Avenue
Silver Spring, MD 20910-4500
(301) 587-1788 Voice
(301) 587-1789 TTY

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SUMMARY

At the heart of the captioning mandates contained in the Telecommunications Act of 1996 was a decision by Congress to ensure that deaf and hard of hearing individuals have universal access to video programming. Toward this end, Congress created only very narrow exemptions from the captioning requirements, and made clear that the FCC was to apply these in the limited circumstances where a video provider or owner can prove economic or undue burden, or where the mandates are precluded by contracts drafted in good faith. The FCC must keep in mind the extremely limited nature of these exemption provisions in crafting its captioning rules.

Universal access in video programming is more likely to be achieved if captioning comes to be considered part of the production process, much in the same way that sound, music, and other visual effects are part of this process. For this reason, producers, as well as video providers, should be obligated to incorporate captions, although it should be the video providers who are *ultimately accountable* for compliance with the captioning obligations. The actual responsibility for incorporating captions should be apportioned between producers and providers in their contractual agreements.

An eight or ten year transition period for the incorporation of captions on new programs would be inconsistent with the intent of Congress to make television accessible to deaf and hard of hearing individuals in a timely fashion. Rather, a three or four year period would be more harmonious with this intent, yet serve as a realistic goal for this programming. The NAD proposes a seven year transition period for library programming, but urges that Congress intended

for 100% of all such programming which is exhibited to the public, to ultimately be captioned.

The proposed exemption of as much as 25% of all library programming violates the Congressional goal of universal television access.

Whatever schedules are ultimately applied, the Commission must ensure that its percentage requirements be over and above the amount of captioning already provided on the effective date of the FCC's rules. In addition, percentages in any transition schedule should be applied to each channel, rather than on a system-wide basis. Finally, all previously captioned programming should be shown with captions intact, regardless of whether (1) the programming has been edited or compressed, or (2) the provider has already met its percentage requirements.

The NAD opposes automatic exemptions for foreign language programming, cable access programming, instructional programming, advertising (commercial, promotional, and political), home shopping programming, music programming, weather programming, and sports. Rather than a blanket waiver, exemptions under Section 713(d)(1) for programs in each of these categories should be granted only where there is proof of financial burden. Exemptions based on contract under Section 713(d)(2) should be permitted only for contractual clauses drawn in good faith. Undue burden exemptions granted under Section 713(d)(3) should be granted on a case-by-case basis, rather than as part of rulemakings which are widely applicable for broad classes of programming. Only entities actually responsible for complying with the FCC's captioning rules should be permitted to seek exemptions under any of these sections.

Minimum standards of captioning quality are necessary now to prevent the proliferation of

low quality captioning by new businesses now expected to enter the captioning industry. Such standards should focus on the need to ensure that captioning transmits information which is functionally equivalent to information available through a program's soundtrack, and should include a requirement that real-time captioning services, rather than electronic newsroom captioning, be used for live newscasts. The FCC should monitor captioning quality, and, as needed, issue more detailed standards on captioning quality within two years. A council or coordination point, consisting of representatives of industry, consumers, and governmental representatives can assist in such monitoring efforts, serve as a clearinghouse for gathering and distributing information on common captioning problems and resolutions, and field (and attempt to resolve) captioning complaints before they are filed with the FCC. A requirement for video providers to retain information about their compliance efforts in a public file would also assist in securing compliance with the new captioning mandates.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)	
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)	
Video Programming Accessibility)	

COMMENTS OF
THE NATIONAL ASSOCIATION OF THE DEAF

I. Introduction

The National Association of the Deaf ("NAD") hereby submits these comments to the Federal Communication Commission's ("FCC's" or "Commission's") Notice of Proposed Rulemaking (NPRM) on closed captioning of video programming. The NAD is the nation's largest organization safeguarding the accessibility and civil rights of 28 million deaf and hard of hearing Americans in education, employment, health care, and telecommunications. The NAD is a private, non-profit federation of 51 state association affiliates including the District of Columbia, organizational affiliates, and direct members. The NAD seeks to assure a comprehensive, coordinated system of services that is accessible to Americans who are deaf and hard of hearing, enabling them to achieve their maximum potential through increased independence, productivity, and integration.

The NAD has been an active participant in this FCC docket, having submitted extensive comments and reply comments on the FCC's Notice of Inquiry (NOI) on closed captioning and video description. In the Matter of Closed Captioning and Video Description of Video Programming, MM Docket No. 95-176, FCC 95-484. At the outset, the NAD wishes to thank the Commission for recognizing the importance of promoting full and equal access to video programming for all Americans, including deaf and hard of hearing Americans. As we noted in our comments to the NOI, closed captioning creates a lifeline to the world of television for deaf and hard of hearing people, providing essential access to local, national, and worldwide events and entertainment. Section 713 of the Communications Act and this FCC proceeding represent the culmination of federal efforts to bring these individuals the information and knowledge that television has long provided to the rest of our society.

II. Both Program Providers And Producers Should be Covered by the Closed Captioning Rules, but Providers Should Bear Ultimate Responsibility for Compliance.

The FCC has noted that, from a practical and financial standpoint, captioning at the production stage is more efficient than captioning after program production is completed. ¶30. We agree. Moreover, captioning should logically be considered a part of the production process, much in the same way that sound, music, and other visual effects are part of this process. This is in keeping with the new emphasis of the 1996 Telecommunications Act on "universal design," a principle which seeks to ensure that products and services are designed and developed to be accessible to the widest number of consumers possible. For these reasons, and for the reason that Section 713 covers program "owners" as well as "providers," we support an interpretation of Section 713 that provides the Commission with jurisdiction over program producers as well as providers. Indeed, occasions may arise where the cost of captioning may be too burdensome for a

provider, but could easily be incorporated into the production budget of the program. In that case, we believe that Congress intended for captioning to be provided by the program's producer.

We also agree with the Commission, however, that it will be easier for both the FCC and consumers to monitor compliance with the captioning rules if program providers are ultimately responsible for ensuring compliance with those rules. ¶128. Thus, we urge the FCC to adopt a rule that imposes the compliance obligations on video programming providers, with the understanding that these providers likely will incorporate those requirements into their contractual agreements with producers. It would then be incumbent upon both providers and producers to apportion responsibility for satisfying the captioning mandates, much in the same way that theater owners share responsibility for providing sign language interpreters with traveling theater troupes under Title III of the Americans with Disabilities Act.

III. Video Programming Delivered Through the Internet and Other Emerging Technologies Should be Covered Under the Captioning Rules.

As a threshold issue, the FCC seeks to ensure that video programming provided through a variety of mediums, including broadcast, cable, wireless, and satellite services, are required to comply with the new captioning mandates. However, not mentioned in the FCC's NOI or NPRM is video programming delivered over the Internet and via other emerging technologies. For example, in the future, it may very well be possible to access video programs through Internet tools such as WebTV. High resolution copies of videos downloaded through such mediums should be required to contain captions that can then be exhibited and viewed by means of decoder-equipped televisions.

IV. The Transition Schedule for Captioning Should be Short and Enforceable.

The FCC proposes a transition schedule of eight years to phase in captioning of all non-exempt new programming. This would require an additional 25% in captioning every two years. As an alternative, the FCC seeks comment on whether the phase-in period should be ten years, with 25% after 3 years, 50% after 5 years, 75% after 7 years, and 100% after 10 years. ¶41.

Insofar as Section 713 requires all new, non-exempt, video programming (first published or exhibited after the effective date of the FCC's regulations) to have closed captions, the NAD submits that a timetable of either eight or ten years would be inconsistent with the intent of Congress to make television accessible for individuals with hearing disabilities in a timely fashion. While we understand the need for a phase-in period, the NAD strongly maintains that full captioning can and should be achieved in a three to four year period. In addition to meeting Congressional intent, a short transition period is also warranted for the following reasons:

- Closed captioning technology already exists and has been successfully used for quite some time; i.e., we are not entering an area where the technology and its use has yet to be developed. Moreover, the costs of captioning are going down and the technologies for inserting captions are rapidly improving, which are lessening the burden of satisfying the captioning requirements,
- When there is an increased demand for captioning, then the pool of captioners will quickly grow to meet that demand,
- The need for captioning is overwhelming as is reflected in the statistics provided in the many responses to the Commission's NOI. Put simply, comprehensive closed captioning will have a huge impact on the lives of deaf and hard of hearing individuals,
- Presently, Congressional staff members are proposing actions that will significantly cutback appropriations for video captioning under the Individuals with Education Disabilities Act. These proposals are based on the perception the FCC will be requiring comprehensive captioning access within a very short time frame. Should the transition schedule be a long one, huge gaps in the amount and types of programming that are captioned will likely occur in the coming years.

The NAD is concerned about other aspects of the Commission's proposed eight year transition period as well. To begin with, it is not clear whether the FCC's transition schedule suggesting 25% in the first 2 years is intended to propose 25% over and above what is already captioned. Were it simply to propose 25% (and not 25% above the percentage of captioned shows), many stations that are already providing captioning on 25% of their programs would not be required to do anything during the first two years after the effective date of the Commission's captioning order. Similarly, broadcast stations that already caption 75% of their programs would need not do anything to comply with Section 713 until the year 2003! Surely this was not a result intended by the passage of an Act that took place in 1996.¹ We request that the FCC make clear that its percentage requirements be over and above the amount of captioning already provided on the effective date of the FCC's rules.

We are also concerned that it would be difficult to enforce a transition schedule that looks simply at programming percentages, especially because neither consumers nor the Commission would have sufficient knowledge as to exactly which programs would be covered in the required 25% in any given time period. A transition schedule that relies upon programming time slots, and which establishes deadlines according to the time of day, would make more sense, and would be easier to enforce. Such a schedule could take into consideration peak viewing times, and require earlier captioning of programs exhibited during those time slots. For example, if the transition period is three years, as we have proposed, the schedule could look like this: in Year One, captioning for all non-exempt programming would be required from 6 to 9 a.m. and 6 to 11 p.m.;

¹ We also have a concern that some programmers might even cut back the amount of their captioning to bring it down to the minimums required.

Year Two would be expanded to run from 5 a.m. to 12 p.m., and from 3 p.m. to 12 a.m., and by Year Three all non-exempt programming would be covered. A schedule of this sort would not only facilitate enforcement; it would also ensure that programming most likely to be seen by the majority of Americans would be captioned earlier in the transition schedule. By its nature, the time slots chosen would likely ensure that news and current events, programming of critical importance to deaf and hard of hearing communities, would be captioned first. Finally, because most programming providers schedule their programs on a weekly basis, determinations as to whether the percentage requirements have been met also should be gauged weekly. See ¶45.

The FCC also asks whether the percentages in its transition schedule should be applied to each program service or channel, or on a system-wide basis. ¶¶43, 44. We agree with the Commission that, if applied on a system-wide basis, a cable operator could choose to completely caption one of its networks, while transmitting three others without captioning, during the first two years of the FCC's transition schedule. Because deaf and hard of hearing individuals seek a diversity of captioned programming, we urge that each channel be individually required to comply with the percentage requirements. Also, multichannel video programming distributors (MVPDs) should not be permitted to meet their obligations simply by passing through the captioned programs of the broadcast stations they carry. Where a broadcast station is retransmitted by an MVPD, the obligation to caption the station's programming should fall upon the broadcaster. The MVPD should not shoulder the broadcaster's captioning obligations; nor should the MVPD be permitted to count the amount of captioned programming which it passes through from broadcast stations toward its percentage requirements. Nevertheless, the obligation to pass

through those captions intact should fall upon all MVPDs, as is already required for cable systems under the Communications Act.

V. All Previously Captioned Programming Should Be Shown with Captions Intact.

The FCC proposes that where programming is delivered to providers after it has already been captioned, and the provider does not edit the programming, the provider must transmit the programming with the captioning, regardless of whether the provider has already met the percentage requirements contained in the transition schedule. ¶47. The failure to exhibit programming with captions where those captions have already been inserted is a common occurrence and is a consumer complaint frequently brought to the attention of the NAD. For example, consumers are both confused and frustrated when they have knowledge that a program has been captioned on home video or on a broadcast network and is then re-aired without those captions on a cable station. Indeed, in many instances the failure to provide captions where a program has not been edited or compressed simply results from misplacement of the captioned master tape or a lack of awareness as to the availability of a captioned version. Thus, we strongly support a rule requiring the transmission of such programming with captions intact.²

Equally important, however, is a requirement ensuring that programming that previously contained captions *which may have been edited* also be transmitted with those captions when shown after the effective date of the Commission's regulations. Editing of programs for new commercial advertisements or time slots is a frequent occurrence, and a "previously captioned" rule that does not apply to edited programs would have far too little effect in terms of promising

² The FCC should make clear that such a rule applies to home videos, as well as video programs previously exhibited through a television medium.

captioning access. The cost of reformatting captions when editing has taken place is insignificant - approximately 10 to 25 percent of the original captioning costs. Moreover, such costs are expected to drop in the coming years, as new technologies simplify the process for reformatting. Thus, we propose that providers be required to reformat captions as needed, regardless of compliance with the percentage requirements, unless the provider successfully petitions the FCC for an undue burden exemption under 47 U.S.C. §713(d)(3).

VI. Digital Technologies Must Take Into Account Captioning Access.

The FCC raises concerns about the impact of its closed captioning rules on the development of new digital technologies. ¶48. In particular, the FCC notes that some programming services use multiplexing to offer several programs at the same time, and asks how to create captioning requirements for multiple simultaneous programming. ¶49.

The NAD submits that where audio output can be selected for given programs that are available through multiplex programming, captioning should similarly be available for those programs. So long as the technology exists for passing through captions, there is no reason to deny deaf and hard of hearing individuals visual access to such channels, when the general public has audio access.

Most importantly, we urge the FCC to create a rule that ensures the provision of captions as new digital technologies are created. In its NOI on closed captioning, the FCC recognized that the Television Decoder Circuitry Act in fact requires steps to be taken to ensure the continuation of closed captioned television programming as new video technology, such as advanced television, is developed. In the Matter of Closed Captioning and Video Description, Notice of Inquiry, FCC 95-484, MM Dkt. No. 95-176 (December 4, 1996) at ¶17. As we noted in our

comments to the NOI, NAD Comments at 33, unless the hardware that is used to digitize video is designed with the conveyance of captions in mind, digital TV could become inaccessible to caption transmissions. Similarly, we noted and again reemphasize, the importance of setting aside sufficient bandwidth to take advantage of new captioning technologies that can be used with digital transmissions. We urge the Commission to incorporate a rule that ensures full captioning access as these new digital technologies are deployed.

VII. The Commission's Rules Should Ultimately Require 100% of Captioned Access to Library Programming Which is Exhibited to the Public.

The FCC defines library programming as programming that was first published or exhibited prior to the effective date of its captioning regulations. The Commission concludes that the language of Section 713 and its legislative history do not mandate 100% captioning of all library programming. Rather, the FCC seeks comment on whether its rules should require that 75% of all library programming be captioned, and asks for time frames for the transition period for this type of programming.

The distinction between new and library programming drawn by Congress in Section 713 was intended to reflect the understanding that significant volumes of programs are sitting on studio and provider shelves, much of which may never be exhibited to the public. Because Congress was concerned that captioning requirements which would apply to all such programming might be too burdensome, it created Section 713(b)(2), which directs providers or owners to "maximize" the accessibility of this library programming. Having been involved in the Congressional deliberations on this issue, the NAD submits that, in fact, Congress always intended that library programming which would be exhibited to the public would be shown with captions, and that Congress only meant to exclude those programs which continue to gather dust

on closet shelves. Indeed, whole channels are devoted to the exhibition of library programs, demonstrating the value of having access to this type of programming.³

Contrary to the FCC's interpretation, both the statutory language of Section 713 and its legislative history make clear that a 75% requirement for library captioning is not what Congress intended. Section 713(b)(2) requires that video programming providers or owners maximize library programming "except as provided in subsection (d)". As the FCC is well aware, subsection (d) only permits exemptions where captioning is economically or unduly burdensome, or where such action would be inconsistent with contractual obligations.⁴ The Commission's present proposal to exempt as much as 25% of all library programming does not rest on any of these permissible considerations. Indeed, the NPRM itself cites legislative history requiring that preexisting programming be captioned "to the maximum extent possible." ¶57, citing H. Rep. at 114.⁵ Accordingly, we vehemently oppose any rule that exempts entirely 25% of library programming exhibited to the public, as inconsistent with legislative fiat. Rather, a rule which incorporates a longer phase-in period - for example seven years - for 100% of library

³ Many old programs depict an earlier time in American history which caption viewers otherwise have no access to. Shows like I Love Lucy, Mash, All in the Family, and Donna Reed reflect the cultural, political, and societal mores of a very specific time in our nation's history. Deaf and hard of hearing people should not be denied access to such portrayals of our national times.

⁴ The Conference Report on Section 713 squarely states that "[a]ny exemption [under Section 713(d)] should be granted using the information collected during the inquiry, and should be based on a finding that the provision of closed captioning would be economically burdensome to the provider or owner of such programs. See H. Rep. No. 104-458 (104th Cong., 2d. Sess.) (1996) at 234.

⁵ Webster's New Collegiate Dictionary (1994 ed.) at 710 defines "maximize" as follows: "to interpret something in the broadest sense" and "to increase to a maximum." In turn, "maximum" is defined as "the greatest quantity or value attainable," and "the period of highest, greatest, or utmost development."

programming, but which recognizes that shelved videos need not be captioned until they are exhibited, would accurately reflect Congressional intent on this issue. Such captioning obligations would remain subject to the exemptions contained in Section 713(d).

VIII. Classes of Video Programming

The FCC discusses specific classes of video programming, and proposes to include certain of these within its “general exemptions” for economic burden. In granting these exemptions, we urge the FCC to bear in mind the following points: (1) as much as ten percent of our population is comprised of deaf and hard of hearing individuals, (2) with few exceptions, captioning costs are but a small fraction of overall production costs, (3) to date, captioning has never impeded the video production process, and (4) creative and innovative funding mechanisms and contractual arrangements, together with volume discounts and competition in the captioning industry, will increasingly make captioning affordable for video providers. The NAD responds to the specific classes of programming raised in the NPRM as follows:

Foreign Language Programming - Significant populations in the United States use languages other than English. Individuals who have both a hearing disability and use a different primary language typically face a double barrier to information access in our society. Captioning can help to eliminate at least one of these obstacles. The NPRM alludes to concerns that there may not be sufficient numbers of captioners who are fluent in other languages. We are not aware of any such scarcity; indeed, captioning agencies report that they employ individuals who are able to caption in Spanish, French, German, and other languages. They further confirm that the provision of non-English captioning is a growing segment of their businesses. For these reasons,

the NAD opposes an exemption where captioning for these populations is technically feasible, i.e., for languages that use Latin-based alphabets.

To the extent that the FCC grants a technical exemption for languages that do not use Latin-based alphabets, see ¶ 72, such exemption should be revisited when new technology for the Advanced Television closed captioning standards becomes available, as this technology will make possible captioning in non-Latin-based alphabets, such as Chinese and Hebrew.

Programming That is Primarily Textual in Nature - While the NAD does not oppose an exemption for programming that is provided visually without relevant audio track, we caution that stock tickers, usually shown on CNBC, are frequently accompanied by essential audio output which should be captioned. Additionally, in making determinations as to whether programming is primarily textual in nature, the Commission should consider whether the audio portion of the program is needed to fully understand the content of the program. If so, then the programming should not automatically be exempt.

Cable Access Programming - As the FCC notes, public, educational, and governmental (PEG) access programming frequently contains information that is of considerable value to the community. ¶ 74. Because of its high public interest value, the NAD opposes a general exemption for this type of programming. Indeed, Congress has already recognized the importance of access to governmental programming in Title II of the Americans with Disabilities Act (ADA), which requires effective communications access to the information provided by such programming.⁶

⁶ As we noted in our comments to the NOI, at least one state legislature, Rhode Island, was successfully sued for its failure to make its televised legislative proceedings accessible through closed captioning. That state is now working with a captioning agency to provide access to its proceedings. NAD Comments at 39.

Because there are, in fact, easy, inexpensive, and innovative solutions to ensuring access to the critical information that PEG programming contains, we oppose a wholesale exemption for these channels. For example, as noted, under the ADA, local governments are already required to provide access to city council and other governmental hearings. Often real-time captioners or court-assisted reporting services are used to provide such access; the captions thus generated could be used for simultaneous television transmissions of these hearings. Second, governmental or educational bodies can perform captioning themselves through the use of new, low-cost, do-it-yourself captioning software and hardware. A third, albeit less desirable, way to fund PEG captioning is to require cable systems which carry PEG programming to set aside a fund for PEG captioning, much in the same way that telecommunications relay services are funded through uniform subscriber rates on telephone bills. Specifically, an additional few cents per month can be added to the bills of cable subscribers to fund captioning of these low budget productions. This has already been done in at least one city, Fremont, California, where local cable subscribers are assessed seven cents on their monthly bills to fund live captioning of school board and city council meetings.

Finally, we support the FCC's conclusion that leased access channels not be exempt from the captioning requirements. ¶75.

Instructional Programming - The production budgets of entities providing instructional programming vary considerably. Satellite and other televised courses are now commonly used to earn diplomas; deaf and hard of hearing individuals should not automatically be excluded from access to such programming. Moreover, as holds true for PEG programming, Congress has mandated communications access to televised instructional programming provided by public and

private educational institutions, under Titles II and III of the ADA. Finally, as the FCC notes, some nationally-distributed instructional programming may be prerecorded and have repeated showings, and captioning for such programming would not impose significant economic burdens.

¶76. For each of these reasons, the Commission should reject a blanket exemption for such programming. Rather, the incorporation of captions should simply become an integral part of the production process of instructional programming.

Advertising - The FCC is correct in noting that the incentive for advertisers to caption will increase as the percentage of captioned programming increases. ¶77. Already, thousands of advertisements are captioned each year, and the failure to caption is frequently the result of a lack of awareness rather than a lack of financial ability. Commercials provide important information for making consumer choices about products and services for the twenty-eight million Americans who are deaf and hard of hearing. Insofar as exemptions under §713(d)(1) are to be based only on economic burden, and many, if not most businesses who use the television medium can easily afford the cost of captioning an advertisement (approximately \$200), a blanket exemption for this type of programming would be wholly inappropriate.

Home Shopping Programming - For the same reason that deaf and hard of hearing consumers seek access to advertisements, these consumers seek access to the information provided in home shopping programs. Insofar as the addition of captions is likely to more than

offset the cost of providing such access through sales of products, we agree with the Commission that an exemption for this class of programming should not be granted. ¶78.⁷

Interstitials and Promotional Advertisements - Promotional advertisements enable viewers to make informed choices in their television viewing. Frequently, information about upcoming programs is not available in television listings, and these advertisements provide the sole source of guidance for selecting programming. The FCC raises concerns about the short turn-around time for the captioning of promotional advertisements. One means of handling this rapid turn-around time would be for program providers to hire in-house captioners, who would be readily available to caption as the promotions are prepared. This would not be burdensome for national broadcasters, large producers, or cable stations, and might even conserve resources, as these individuals would be available for captioning other programs. Only to the extent that such promotional programming is provided on a local basis with insufficient funds - by, for example, local community colleges or very small cable providers - should such programming qualify for exemptions from the captioning requirements. Where exemptions are granted, we agree that the basic information such programming contains “should be displayed in some textual or graphic form in order to provide accessibility to persons with hearing disabilities.” ¶79.

Political Advertising - As we noted earlier, the cost of captioning advertisements is exceedingly small when compared with the cost of producing and airing those advertisements. The FCC has acknowledged that information about candidates is critical for deaf and hard of hearing persons, ¶80; put simply, citizens need to know the opinions of political candidates in

⁷ Providing access to these televised shopping services would be consistent with the requirement contained in the ADA’s Title III for private retail establishments to provide communications (footnote cont’d on next page)

order to cast their votes in an informed manner. The FCC should mandate captioning for candidates in national elections as well as any election for which the candidates receive local or federal government funding. Exemptions for local candidates should not be granted unless those candidates can demonstrate on a case-by-case basis that they would experience an undue financial burden were they required to caption their advertisements. In those limited situations where an undue burden exemption is granted, the FCC should nevertheless require those candidates to carry their advertised information in a textual or graphic form.⁸

Fundraising Activities of Noncommercial Broadcasters - The fundraising activities of noncommercial broadcasters typically involves both (1) high quality programming to attract viewers to the station and (2) appeals for funds. The FCC should make clear that any exemption for fundraising activities should not include the programming portions of these activities. Where exemptions for live funding appeals are granted under Section 713(d)(1), broadcasters should provide periodic information in a textual form to closed caption viewers.

Music Programming - We applaud the Commission's decision for music videos to be captioned. Similarly, we oppose any exemption for theme songs on regularly scheduled programs, because these set the tone for such programming. Indeed, these songs are short and are repeated on a weekly basis; thus, the cost of captioning their lyrics is minimal when compared

access to individuals with disabilities.

⁸ Section 315's provisions concerning the power of censorship over political advertising by television licensees do not apply here. That section concerns the use of broadcasting stations by candidates and the ability to censor information contained in such advertising. As noted above, it is unlikely that a candidate who advertises on television would be unable to afford the additional \$200 cost for captioning such advertising. In any event, as noted above, a candidate for whom such cost would preclude such advertising would be able to receive an undue burden exemption, permitting the airing of such ad without captions. Hence there is no censorship at issue.

to the frequency of their exhibition. Nor should there be an exemption for live performances, which typically provide high quality television programming, and are often provided for national audience viewing (e.g., awards shows). As is true for live theatrical performances, pre-scripted lyrics can be made available to captioners ahead of time, facilitating the captioning of such programming.⁹

Weather Programming - As noted in our comments to the NOI, we agree with the Commission that weather conditions often affect life, health, and safety concerns, and that a significant amount of information conveyed in the audio portion of weather programming is not captured through graphic means. Thus, we applaud the FCC's decision not to exempt weather programming as a class. ¶83.

Sports Programming - Similarly, we applaud the FCC's decision not to exempt either national or local sports programming as a class. ¶84. We agree with the Commission's proposal to exempt sports programming for which captioning would be too burdensome, such as that which is locally produced by colleges or high schools, but urge that the FCC require that such programming provide alternative access, through textual or graphical information which conveys basic information about the program's content.

Classes of Video Providers - We wholeheartedly support the FCC's decision not to exempt any one class of video providers and agree that all classes of providers have the technical capability to deliver captioning intact. ¶85.

⁹ Indeed the provision of lyrics for live musical performances is sure to benefit almost all television viewers, given the fact that it is typically very difficult to discern such lyrics only through auditory means.

IX. The Commission Should Limit Exemptions Based on Existing Contracts to Situations Where the Provider, Producer, or Owner has Exercised Good Faith

The Commission has concluded that programming covered by contracts in effect on February 8, 1996 which affirmatively prohibited captioning, should be granted an exemption under Section 713(d)(2). ¶87. However, Section 713(d)(2), a product of negotiations between the television industry and consumers, was only intended to cover the limited situation where syndicated programs had already been distributed to local broadcasters on videotape, and where requiring the recall and captioning of these tapes would have resulted in a heavy financial burden for those syndicators. The NAD is unaware of any contractual arrangements that would have specifically prohibited captioning, and suggests that such arrangements be highly suspect. Congress considered the captioning provisions of the Telecommunications Act for nearly four years before they were finally enacted. This period would have given producers ample time to have incorporated a prohibition against captioning in their contracts, if they had chosen to do so, as a way of evading the effects of Section 713. Thus, the inclusion of language containing such a prohibition should not be sufficient to exempt a provider from providing captions. Indeed, Congress never intended for this section to otherwise relieve a video provider or owner of its general captioning obligations under section 713. With respect to this and other requests for exemptions based on contractual clauses, we urge the Commission to ensure that a good faith, legitimate reason existed for the contractual provision at issue before granting such an exemption.